SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1164

EARL L. WATTS,

Petitioner in Certiorari

vs.

ETHEL GRADY MYLIUS,

Defendant in Certiorari

PETITION OF EARL L. WATTS FOR REHEARING ON ORDER OF APRIL 24, 1972, DENYING HIS PETITION FOR WRIT OF CERTIORARI.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Earl L. Watts files this his petition for rehearing on the order of April 24, 1972 of this Court denying his petition for a writ of certiorari to the Court of Appeals of Georgia for the purpose of having reviewed, corrected, and reversed the decision and judgment of that Court of September 9, 1971 affirming the order of Judge Jack B. Smith of the State Court of DeKalb County, Georgia of April 7, 1971 denying the motion of your petitioner as amended for a new trial in the case of Ethel Grady Mylius vs. Earl L. Watts in the latter Court for alleged

fraud and deceit, in which a judgment was rendered by said Judge Smith against Watts on December 22, 1970 for $10,000.00 principal, plus interest from August 25, 1970 in the sum of $233.33, and attorney fees in the sum of $3,000.00, IN THE ENFORCED ABSENCE OF WATTS DUE TO HIS SERIOUS ILLNESS AS SHOWN BY THE AFFIDAVIT OF HIS ATTENDING PHYSICIAN, DR. W. HARRISON REEVES, and despite the motion of E. B. Shaw as attorney for Watts for a continuance on said ground, and over his strenuous objection as a denial of Due Process of Law and of Equal Protection of the Law in violation of Section I of Amendment XIV of the U.S. Constitution. It is believed that this Honorable Court has very obviously overlooked the following material facts and controlling decisions in denying the petition for certiorari in this case, because they require, in the opinion of counsel for petitioner, the grant of the writ of certiorari under U.S. Code, Title 28, Section 1257 (3) and Section I of Amendment XIV of the United States Constitution.

The decision of the Court of Appeals of Georgia of September 9, 1971, unless reversed by this Court, will deprive petitioner, a citizen of Georgia and of the United States, of his property to the extent of the amount of the judgment rendered against him by Judge Jack B. Smith of the State Court of DeKalb County, Georgia on December 22, 1970 and other substantial damages resulting therefrom by depriving him of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations, in violation of Section I of Amendment XIV of the United States Constitution in the following particulars:

1. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Georgia Code Section 81-1412 and Section I of Amendment XIV of the U.S. Constitution, the motion of petitioner's counsel for a continuance on the ground that petitioner was seriously

ill and unable to attend court for that reason as shown by the uncontradicted affidavit of his attending physician, Dr. W. Harrison Reeves, submitted to Judge Smith by petitioner's counsel, a copy of which is attached to the petition for certiorari as Exhibit B.

2. In upholding Judge Jack B. Smith in arbitrarily and capriciously denying, in violation of Section I of Amendment XIV of the U.S. Constitution, the motion of petitioner's counsel for a judgment in his favor on the pleadings on the ground that they showed without any genuine issue as to any material fact that he was entitled to said judgment as a matter of law.

3. In upholding Judge Jack B. Smith in arbitrarily and capriciously rendering, in violation of Section I of Amendment XIV of the U.S. Constitution, the judgment against your petitioner for $10,000.00 plus interest from August 25, 1970 in the sum of $233.33 and attorney fees in the sum of $3,000.00 when there was no competent or legal evidence whatever or law to support said judgment.

4. In upholding Judge Jack B. Smith in arbitrarily and capriciously refusing to hold, in violation of Section I of Amendment XIV of the U.S. Constitution, that the contract between Ethel Grady Mylius and Earl L. Watts of August 25, 1970, upon which the suit of the former against the latter was based and a copy of which was attached thereto and also to the petition for certiorari as a part of Exhibit C, DEMANDED A JUDGMENT AS A MATTER OF LAW AGAINST THE SAID ETHEL GRADY MYLIUS AND FOR YOUR PETITIONER.

5. In upholding Judge Jack B. Smith in arbitrarily and capriciously refusing to hold, in violation of Section I of Amendment XIV of the U.S. Constitution, that the petition of Ethel Grady Mylius, as amended with the

contract of August 25, 1970 attached thereto did not show or set forth any cause of action whatever against Earl L. Watts but, on the contrary, showed that she was indebted to him in the sum "of $15,000.00 to be paid on or before February 25th, 1971."

6. In holding that the affidavit of Dr. W. Harrison Reeves that your petitioner was seriously ill and unable to attend any kind of court hearing or trial was "not properly entitled in the case, and was not admissible in evidence," and that "For this reason alone the court did not abuse its discretion in refusing the continuance regardless of the other reasons for denying the same," although Dr. Reeves was not a party in the case and the law did not require his affidavit to be "entitled in the cause," thereby violating Georgia Code Section 81-1412 and Section I of Amendment XIV of the U.S. Constitution.

The argument amplifying the reasons relied on for the allowance of the writ of certiorari and the authorities supporting the same are set forth on pages 10 through 21 of the petition for certiorari and will not be repeated here, but special attention is invited thereto.

In the original complaint of Plaintiff Mylius she contends that Defendant Watts "by misrepresentation induced plaintiff to purchase an alleged 5% interest in an option to purchase the Candler Hotel * * * by entering into an agreement with defendant, a copy of said agreement being attached hereto as Exhibit A and made a part hereof by reference thereto." Reference to said contract, however, will show that it is valid, legal, and unambiguous and specifically states: "(6) Party of the Second Part has read this agreement before signing same, and does hereby enter into said agreement FREELY AND VOLUNTARILY, AND WITHOUT ANY UNDUE IN-

FLUENCE, BEING USED IN ANY WAY TO INFLUENCE PARTY OF THE SECOND PART TO ENTER THIS AGREEMENT."

The contention of Plaintiff Mylius in her complaint that Defendant Watts "by misrepresentation induced plaintiff to purchase an alleged 5% interest in an option to purchase the Candler Hotel" IS UTTERLY FALSE AS SHOWN BY THE COPY OF THE CONTRACT SIGNED BY HER AND ATTACHED TO HER COMPLAINT, stating "That Party of the First Part (Watts) is the holder of an option to purchase the property known as CANDLER HOTEL in Decatur, Georgia — DeKalb County; said option being dated February 2nd, 1970, and said option terminates on February 2nd, 1971" and "that Party of the Second Part (Mylius) DESIRES TO PURCHASE A FIVE (5%) PER CENT INTEREST IN SAID OPTION, which shall at the time of the closing of the purchase of said CANDLER HOTEL, entitle Party of the Second Part (Mylius) a five (5%) per cent interest in said property * * *."

Defendant Watts was prepared and expected to show on the trial of said case (if continued, as required by law, until he was physically able to appear) that Plaintiff Mylius came to the office of the Candler Hotel while he was there and stated she wanted to buy an interest in his said option to buy the Candler Hotel; that from time to time thereafter she came to see him at his property at 694 Durant Place, Atlanta, Georgia, where he had an office, and sought to secure an interest in the Candler Hotel property; that she also called him many times on the phone seeking to obtain from him an interest in said property; that finally on August 25, 1970 she came again to his office at 694 Durant Place seeking to secure an interest in said property and he went with her to the office of Mr. E.B Shaw, Attorney, 116 Pryor St., S.W., Atlanta, Georgia, AT HER REQUEST for the purpose of drawing up and executing a contract with her conveying

to her the interest she sought in the Candler Hotel; that Mr. Shaw drew up said contract according to what Plaintiff Mylius and Defendant Watts had orally agreed upon pertaining to said property; that, after drawing up said contract, Mr. Shaw read it over to Plaintiff Mylius in the presence of Defendant Watts, and Judge and Mrs. Neill Leach, who witnessed the contract; that Mr. Shaw asked Plaintiff Mylius whether she had been induced against her will to agree to this contract, and she told him that she had not and that she was entering into said agreement freely and voluntarily and without any undue influence being used in any way to influence her to enter into said agreement.

The contract provides that upon the payment of $10,000.00 by the second party to the first party at the time of entering the contract and $15,000.00 on or before February 25th, 1971, the second party would receive a five per cent interest in said option and upon the purchase of the property a five per cent interest therein and in the net profits of the business of a Personal Care Home to be operated on said property. It provided that the Second Party would assist and co-operate with Party of the First Part in obtaining a loan for the purchase of said Candler Hotel property and that a part of the $25,000.00 paid by Second Party to the First Party would be used for the expenses of appraisal and loan costs in obtaining the purchase of said property.

The Second Party voluntarily paid the $10,000.00 to the First Party on the date the contract was signed but never paid the balance of $15,000.00 she agreed to pay or any part thereof and did not assist and cooperate with Party of the First Part in any manner in obtaining a loan for the purchase of the property as she agreed in said contract to do. Defendant Watts was prepared and expected to show on the trial of said case (if continued until he was physically able to appear, as required by law) that Plaintiff Mylius conspired and acted in concert

with other persons by swearing out false and malicious felony warrants against him, causing him to be arrested and imprisoned thereunder, and slandering and harassing him personally and in his business to prevent him from securing said property and to secure it for themselves instead, but that despite their said malicious and lawless conduct, he succeeded in securing a loan to apply on the purchase price of $350,000.00 for said property and consummated said sale and is now operating a Personal Care Home for Retired Persons on it in the name of Candler Manor, Inc. Before Plaintiff Mylius filed said suit against Defendant Watts, she swore out two felony warrants against him, one for Theft by Deception and the other for Violation of Georgia Securities Act, without any justification whatever in fact or law, for the purpose of intimidating and blackmailing Defendant Watts into returning to her the $10,000.00 she voluntarily invested in said option under said contract with him. Judge Smith allowed Counsel for Plaintiff Mylius to state on the trial of this case (in the enforced absence of Defendant Watts due to his serious illness) "we have two felony warrants out for Mr. Earl L. Watts, one for Theft by Deception and the other Violation of Georgia Securities Act. * * * Now, he's playing 'footsey' with the court. * * * Your Honor has the right, according to the law, without it being abusive, to put this case on trial. Justice demands that this gentleman surrender himself to the authorities, and the lawyer has not stated to this court as to the whereabouts of this man." Judge Smith then stated: "What do you mean 'the authority'? Has he not been arrested on these criminal warrants?" Mr. Elliott as attorney for Plaintiff Mylius then stated: "No, sir. Your Honor, he's a fugitive from justice on two felonies — two felony warrants right now. I understand through the authorities that he promised to turn himself in, make bond, and so forth and come before the court as to the two felony charges. We insist * * * that we go to trial on this matter today * * *." Mr. Shaw as attorney for Defendant Watts then invited the Court's attention to

Gideon vs. Wainwright, 372 U.S. 335, 83 S. Ct. 792, and Ferguson vs. State of Georgia, 365 U.S. 570, 81 S.Ct. 756, in support of his motion for a continuance. He vigorously contended that Defendant Watts had the right to be represented by counsel and that his counsel had the right to have the client in court at the trial; that he could not properly represent him without his being in court and that he (Watts) would be deprived of Due Process of Law in violation of the Constitution, by trying his case in his absence while he was seriously ill and not able to attend court as shown by the affidavit of his physician, Dr. Reeves. Judge Smith then stated in part: "All right, if this man had come in and surrendered himself, made bond on criminal proceedings and if some doctor had come in, I would grant the motion but under the circumstances I have discretion in the case and I've got to look after the plaintiff's rights as well as the defendant's rights. I am going to go ahead and declare this case on trial and, of course, if we get to such particular point where The Court feels that his rights are being jeopardized or if he has reason to order a continuance, I can always declare a mistrial and put it over to some date in the future, I am going to let the case proceed." Judge Smith then proceeded to try the case in the absence of Mr. Watts and rendered judgment against him as aforesaid (T.39-44, 79).

Before the trial started, Mr. Shaw also presented and had filed as a part of the record with the approval of Judge Smith the following written motion: "I move for a continuance on the ground that my client is not able to attend court and will not be able to attend court for approximately seventy-five (75) days as shown by the affidavit of his physician, which I am submitting to you. I am not in a position to try this case without my client or when he is physically unable to be present and cooperate with me in the trial of it. If said motion is refused for continuance, I respectfully note an exception

thereto upon the following grounds: (a) It would deprive the defendant of his property without Due Process of Law and without Equal Protection of the Law and in violation of Article I, Section I, Paragraphs I, II, III, IV, V, and XXIII of the Georgia Constitution and Amendments V, IX, and X of the U.S. Constitution as applied to the states by Section I of Amendment XIV thereof. I respectfully call your Honor's attention to the following cases: Gideon vs. Wainwright, 372 U.S. 335, and Ferguson vs. State of Georgia, 365 U.S. 570." It was overruled by Judge Smith by proceeding to try the case in your Petitioner's absence.

At the instance of Plaintiff Mylius and the persons conspiring with her, the Grand Jury of DeKalb County Georgia at the March Term, 1971 returned a special presentment charging Defendant Watts with Theft BY Deception as therein described based upon the warrant to said effect sworn out by Plaintiff Mylius. Defendant Watts was not able in his seriously ill condition at that time as described in the affidavit of Dr. Reeves to surrender himself to the sheriff or make bond in response to said felony warrants and special presentment. Thereafter he was arrested and imprisoned and made bond and appeared for trial several times but the said criminal cases were never tried and his counsel therein advised him that they were placed on the "dead docket." Defendant Watts was prepared and expected to show on the trial of said criminal cases that he was not guilty of either of said alleged felonies and that they were made against him by Plaintiff Mylius with the aid and cooperation of G.L. Ledbetter and L. Louvenia Kundtz pursuant to a conspiracy to prevent him from securing the Candler Hotel property under his option thereon, in violation of Ga. Code Sections 26-1801 and 26-1901.

In the brief of Appellee Mylius in the Court of Appeals in her civil case against Defendant Watts, her counsel stated that he made a counter showing to the

motion of Mr. Shaw, as attorney for Watts for a continuance by reason of his illness; that he "stated to the court that there were two felony warrants outstanding for appellant, one for theft by deception and the other for violation of Georgia Securities Act," and "that Appellant had not been arrested and was currently a fugitive from justice on these two felony charges."

In the response of Defendant in Certiorari in this Court she states that "The evidence relative to Appellant's motion for continuance is void of any statement from Appellant's counsel that he cannot go to trial safely without Appellant's presence."

Attorney Shaw vigorously contended before Trial Judge Smith that Defendant Watts had the right to be represented by counsel and that his counsel had the right to have him in court at the trial; that his counsel could not properly represent him without his being in court, and that he (Watts) would be deprived of Due Process of Law according to the Constitution by trying his case in his absence while he was seriously ill and unable to attend court as shown by the affidavit of his physician, Dr. Reeves. Mr. Shaw submitted said affidavit of Dr. Reeves to Judge Smith and filed with him as his Exhibit 2 and read to him the following Motion: "I move for a continuance on the ground that my client is not able to attend court and will not be able to attend court for approximately seventy-five (75) days as shown by the affidavit of his physician, which I am submitting to you. I am not in a position to try this case without my client or when he is physically unable to be present and cooperate with me in the trial of it. If said motion is refused for continuance, I respectfully note an exception thereto upon the following grounds: (a) It would deprive the defendant of his property without Due Process of Law and without Equal Protection of the Law and in violation of Article I, Section I, Paragraphs I, II, III, IV,

V, and XXIII of the Georgia Constitution and Amendments V, IX, and X of the U.S. Constitution as applied to the states by Section I of Amendment XIV thereof. I respectfully call your Honor's attention to the following cases: Gideon vs. Wainwright, 372 U.S. 335, and Ferguson vs. State of Georgia, 365 U.S. 570."

On page 3 of the response of Mrs. Mylius she contends that the affidavit of Dr. Reeves "was a sham and an attempt to delay the plaintiff's case," without any evidence whatever to support this contention. She also contends on page 3 of said response that "The trial court detected that apparently Mr. Watts was hiding from the authorities to prevent arrest based on outstanding warrants and that his acts were not in good faith and that the ends of justice required that the plaintiff be allowed to proceed," without any evidence or law whatever to support this contention.

Respondent contends on page 4 of her response that your petitioner has not raised "a federal question of gravity and importance in the State Court" and that he "cannot now raise a federal question for the first time." This is incorrect. He raised Federal Questions of Gravity and Importance in the State Court of DeKalb County, the Court of Appeals of Georgia, and The Supreme Court of Georgia, and urged said Federal questions in his Petition to this Court for a writ of certiorari. It has already been pointed out how he raised the Federal Constitutional questions in the State Court. He contended orally and in writing in the Court of Appeals that "The State Court of DeKalb County, Georgia, erred in granting and awarding a judgment to appellee on December 22nd, 1970, and in depriving appellant of property without due process of law and without equal protection of the law and in violation of Article I, Section I, Paragraphs I, II, III, IV, V and XXIII of the Georgia Constitution and Amendments V, IX and X of the U.S. Constitution as

applied to the States by Section I of Amendment XIV thereof." He urged the same Federal constitutional ground in his petition to the Supreme Court of Georgia for a writ of certiorari to the Court of Appeals of Georgia. The particulars in which petitioner was deprived of his property without Due Process of Law and of Equal Protection of the Law are set forth in his petition to this Court for certiorari.

It will be observed from the foregoing, and especially in light of the Petition for Certiorari, that petitioner has been deprived of HIS DAY IN COURT in violation of Section I of Amendment XIV as construed and applied by this Court in *Hovey vs. Elliott, 167 U.S. 409, 17 S.Ct. 841*, holding in part as follows:

> "In Galpin v. Page, 18 Wall. 350, the court said (page 368): 'It is a rule as old as the law and never more to be respected than now, that no one shall be personally bound until he has had HIS DAY IN COURT, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination: It is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'
>
> "Again, in Ex Parte Wall, 107 U.S. 289, 2 S.Ct. 569, the court quoted with approval the observations as to 'due process of Law' made by Judge Cooley in his Constitutional Limitations, at page 352, where he says: 'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under

the protection of the general rules which govern society.'

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.'"

Petitioner concludes this petition for rehearing with the following quotations from the Holy Bible:

"The Lord executeth righteousness and judgment for all that are oppressed," Psalm 103:6.

"For God shall bring every work into judgment, with every secret thing, whether it be good, or whether it be evil." Ec. 12:14.

"For there is nothing covered, that shall not be revealed; neither hid, that shall not be known." Luke 12:2.

"In the day, when God shall judge the secrets of men by Jesus Christ according to my gospel." Romans 2:16.

"Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God, and they that resist shall receive to themselves damnation. For rulers are not a terror to good works but to the evil. Wilt

thou then not be afraid of the power? Do that which is good and thou shalt have praise of the same." Romans 13:1-3.

WHEREFORE, Petitioner earnestly and urgently appeals to this Honorable Court to grant this petition for a rehearing on its order of April 24 1972 denying his petition for writ of certiorari and that it now grant said writ to the Court of Appeals of Georgia to review, correct, and reverse its decision of September 9 1971 affirming the order of Judge Jack B. Smith of the State Court of DeKalb County, Georgia of April 7, 1971 DEPRIVING PETITIONER OF HIS DAY IN COURT IN VIOLATION OF SECTION I OF AMENDMENT XIV OF THE U.S. CONSTITUTION.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Petitioner

1626 Candler Bldg.,
Atlanta, Ga. 30303

E. B. SHAW,
Of Counsel for Petitioner

CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Supreme Court of the United States.

This the _____ day of June, 1972.

G. SEALS AIKEN,
Attorney for Petitioner.

EDGAR B. SHAW,
Of Counsel for Petitioner.

CERTIFICATE OF SERVICE

This is to certify that I have this day served Defendant Ethel Grady Mylius with the foregoing petition for rehearing by sending a copy of the same by first-class mail to Messrs. James A. Mackay and Thomas W. Elliott, Suite 500, One West Court Square, Decatur, Ga. 30030, her counsel of record.

This the _____ day of June, 1972.

G. SEALS AIKEN,
Attorney for Earl L. Watts.